United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2017

To be argued by
RALPH L. McMURRY

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P/S

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. TIMOTHY MORGAN,

Petitioner-Appellee,

-against-

ROBERT HENDERSON, Superintendent,
Auburn Correctional Facility,

Respondent-Appellant.

BRIEF FOR RESPONDENT-APPELLANT

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES ex rel. TIMOTHY MORGAN,	:	
Petitioner-Appellee,	:	
-against-	:	75-2017
ROBERT HENDERSON, Superintendent, Auburn Correctional Facility,	:	
Respondent-Appellant.	:	

BRIEF FOR RESPONDENT-APPELLANT

Preliminary Statement

Respondent-appellant appeals from a decision of the United States District Court for the Northern District of New York, Port, J., granting, after hearing, petitioner-appellee's application for a writ of habeas corpus.

Questions Presented

1. Whether the District Court erred in failing to apply the "totality of the circumstances" test to determine the voluntariness of a guilty plea entered prior to Boykin v. Alabama , 395 U.S. 238 (1969), and whether under such test petitioner's plea was voluntary?

2. Whether petitioner's guilty plea was rendered involuntary by an alleged failure to inform him of the formal legal elements of the crime to which he pleaded, and in any event whether petitioner had a fair understanding of the law in relation to the facts?

3. Whether petitioner's guilty plea was a reasoned, strategic, intelligent, and voluntary choice among available alternatives?

Statements of Facts

On April 7, 1965, one Mrs. Ada Francisco of Fulton County was stabbed over forty times by an assailant. Mrs. Francisco sustained multiple wounds resulting in her death. Petitioner, who was arrested and convicted for the crime, was at the time nineteen years old and of limited intelligence. He had been attending Rome State School and was working on the victim's farm. The record is not entirely clear, but evidently a dispute arose between Ada Francisco and petitioner. In any event, petitioner killed his employer Ada Francisco one evening, took a small sum of money from the house and fled in a car. Some 100 miles away petitioner was involved in an accident and was promptly arrested. Petitioner gave a confession to the police.

A. Arraignment

Petitioner was indicted for first degree murder,* and on April 15, 1965, was arraigned before the Honorable Judge Soden of the Fulton County Court. At that time, the court assigned two lawyers, Mr. Best and Mr. Rinehart, to represent petitioner. Petitioner stated that he had consulted with counsel (A94**). These counsel were praised by the trial court as "perhaps the best qualified and best informed lawyers in this type of work in this area" (S127) and "very competent men" (A95). The indictment for first degree murder was read out, charging petitioner with "wilfully . . . and with malice aforethought" stabbing and killing Ada Francisco (A96). Petitioner was advised that he was entitled to a jury trial and was entitled to call witnesses in behalf, and he stated he understood these rights (A96, 97, 98). He said he did not understand when advised of what his rights might be if he had a previous conviction (97-98). The trial court stated that it would cooperate with defense counsel "at any hour of the day or night" (A100).

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* The death penalty was in effect at this time for first degree murder.

** Numbers refer to page numbers of respondent-appellant's appendix. "S" refers to sentencing proceeding; "A" refers to arraignment proceeding; "P" refers to proceeding at which plea was entered; "H" refers to evidentiary hearing in Federal Court.

B. Plea

On June 8, 1965,* petitioner pleaded guilty to murder in the second degree. According to the prosecutor, this plea was at the request of petitioner (P105). Both defense counsel and some members of petitioner's family were present. The trial court recognized that it was dealing with a defendant of low intelligence, and was anxious to make sure that petitioner genuinely understood what was going on (P107). The petitioner stated that he understood that he was accused of killing Ada Francisco, that in pleading guilty he was waiving a trial by jury, that he had consulted with and was pleading with advice of counsel, and that he would be sent to prison (P107-109).

C. Sentence

On June 15, 1965, petitioner was sentenced to an indeterminate term of twenty-five years to life. Defense counsel gave a lengthy statement to the court on petitioner's background and the circumstances of the crime (S114-121). He pointed out

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* Seven days earlier, the death penalty had been abolished in New York with exceptions not applicable here.

that petitioner was of limited intelligence, had a history of trouble in school, and had developed a belligerent disposition. Petitioner was for a time at Rome State School and had been released from there to work for a neighbor, Ada Francisco, on her farm (S114-117).

According to defense counsel, petitioner had developed a liking for a young lady in a nearby village and enjoyed going there on his bicycle to visit her. On several occasions, counsel suggested, petitioner returned home late to the consternation of Mrs. Francisco, who allegedly once slapped him. A hostility developed between petitioner and Mrs. Francisco over this problem. Petitioner feared he might be returned to Rome State School, and decided to collect the wages due him and leave. When he went to Mrs. Francisco's room with a knife, "he meant no harm to that lady" (S118). However, when he awoke Mrs. Francisco she began to scream, and petitioner, with his "uncontrollable and ungovernable temper" and "in order to stop the screaming and in the excitement of it all" (S119) committed an "assault" resulting in Mrs. Francisco's death. The District Attorney disputed counsel's version of the facts.

Before passing sentence, the court stated that it had studied the pre-sentence report, a Family Court report, and petitioner's records of Rome School (S126). The court noted that petitioner had been represented by two highly qualified lawyers, and noted that there had been many conferences on the case so that "all the possible facts, psychological, social and legal data" had come forth (S127). The court stated that it had analyzed the report of psychiatrists from Utica State Hospital, who, after three weeks of examination, concluded petitioner was competent to stand trial and make his defense (S127). The court appreciated that the case had given defense counsel some difficulties. Finally, the court made it clear that he was aware of petitioner's limited intelligence and was taking this into account (S128). The court then passed judgment. The record indicates no surprise or disappointment by petitioner or his counsel when the sentence was pronounced.

D. Post Conviction Proceedings in State Court

Petitioner took no appeal from his judgment of conviction, nor did he make any motion to withdraw his plea. In August, 1970, more than five years after his conviction, petitioner applied for a writ of error coram nobis in Supreme Court, Fulton County, alleging that his plea of guilty was involuntary

and not entered knowingly and intelligently in that he was unaware of the consequences of his plea and that intent was an element of the crime of murder in the second degree. The application was denied without a hearing May 29, 1971. The Appellate Division affirmed without opinion (People v. Morgan, 38 A D 2d 1012 [3rd Dept. 1972]) and leave to appeal to the Court of Appeals was denied July 6, 1972.

E. Application for Habeas Corpus in Federal Court

Following the rejection of his claims in the state courts, petitioner sought relief in the federal courts. Petitioner claimed that the trial court failed to ascertain the factual basis of the plea and that no one told him the elements of the crime to which he pleaded or the consequences of his plea. The District Court, Port, J., denied the application by memorandum and decision dated September 26, 1973 (Appendix, p. 131). However, this Court on December 12, 1973, reversed and remanded for an evidentiary hearing "on the issues raised by petitioner, including whether, at the time of his entry of his guilty plea, he was aware that intent was an essential element of the crime and was advised of the scope of punishment that might be imposed".

F. Evidentiary Hearing in Federal Court

At the evidentiary hearing held in Auburn, New York on May 3, 1974, petitioner took the stand and claimed that at the time of sentence he did not know what sentence he would receive, and specifically claimed that he did not know that he would get as much as 25 years to life (H15-20). Had he known what sentence was going to be imposed, he would not have pleaded guilty (H20,27). He only thought that by pleading he would get a "lesser sentence", which he expected would be something less than life (H21-23). He claims he was never told what the lesser sentence would be (H25). Petitioner says he never asked what his sentence would be, because "I figured they [counsel] knew what they were doing" (H25). Petitioner claims now that he was not satisfied with his two counsel (H21).

Petitioner also claimed that he did not know at the time of his plea that intent was an element of the crime of murder in the second degree. Had he known this, petitioner would not have pleaded guilty because he did not intend to kill Mrs. Francisco. Petitioner learned the elements of murder in the second degree from "friends" at Auburn State Prison some five years later (H13, 14).

Andrew Schlusberg, the prosecutor, testified that there was discussion with the Judge and defense counsel concerning a

plea. Petitioner's brothers and sisters, and possibly his mother, were present in the court that day (H32-33).

Floyd J. Rinehart, called as a witness by the State, testified that he was one of petitioners assigned attorneys. He was an experienced attorney in criminal law, having practiced over forty years (H48). He was assigned to represent petitioner at the arraignment (H39). He discussed the case with his client, the prosecutor, and petitioner's family; made various motions, tried to obtain the confessions, and unsuccessfully tried to change venue (H40, 55). He advised petitioner that first degree murder at that time was punishable by death (H40, 41). Mr. Rinehart felt that a plea to manslaughter would satisfy the needs of justice, but stated that the prosecutor wouldn't budge (H43, 44). He also testified that in his view of the case, a first degree murder conviction was a distinct possibility. He noted that there was "some feeling in the community there and I didn't know what could happen" (H42).

Mr. Rinehart testified that he discussed the plea with petitioner's family, and bargained with the prosecutor for a manslaughter plea (H43). By the time of the plea, the death penalty had been eliminated and petitioner was faced with possible alternative of acquittal or mandatory life sentence following conviction on a first degree murder trial, or a sentence

carrying a minimum of twenty years on a plea to murder in the second degree. Mr. Rinehart knew exactly what the sentence would be on the proposed plea and so advised the petitioner (H45-47, 49), although when recalled at the close of the hearing Mr. Rinehart said that he may have only told petitioner "twenty-five years" instead of "twenty-five to life" (H81).

Mr. Rinehart stated that he distinguished first degree and second degree murder by the sentence rather than by the necessary proof, because "(a)s a rule, a defendant is only interested in the sentence, and the time" (H50). He did not point out the elements of the crime to petitioner (H53). Mr. Rinehart noted that he had obtained the confessions and was familiar with the facts of the case (H53-54). He stated that his co-counsel, Mr. Best, talked with petitioner more than he did and went "very thoroughly, into the law" (H56).

Petitioner's other assigned attorney was also called as a witness by the State. Robert Best testified that he carefully discussed the facts of the case with petitioner (H59), and that petitioner was told what penalty he would receive in exchange for his plea (H62, 63). While he did not recall the details, Mr. Best testified that:

> "I think I recall talking to him in the jail and telling him that if this was the case it could be murder one; and if this was the case it could be murder 2 or manslaughter, if he had intent and thought it over beforehand and if he didn't have premeditation it could be manslaughter." (H66)

No notes could be found concerning this conversation. Mr. Best also testified that he was well aware that differences in grades of homicide were extremely important in analysis of the case, and that discussions with petitioner were structured to take this into account (H69, 70).

Petitioner's mother testified that she couldn't remember anything.

G. Opinion of the District Court

On October 29, 1974, the District Court granted the writ. The District Court found that petitioner was advised as to the consequences of his plea, resolving the conflict of testimony on this point in favor of petitioner's attorneys and against petitioner. However, the District Court found that petitioner was not advised by court or counsel prior to his plea of the elements required to be established for any degree of homicide. The District Court noted that Mr. Best only thought he had so advised petitioner. Citing McCarthy v. United States, 394 U.S. 459, 466 (1969), the District Court held petitioner's plea to be involuntary as a matter of law.

POINT I

PETITIONER'S PLEA OF GUILTY WAS VOLUNTARY UNDER THE TOTALITY OF THE CIRCUMSTANCES.

Since petitioner's plea predated Boykin v. Alabama, 395 U.S. 238 (1969), the test for determining the voluntariness of his guilty plea, made in 1965, is the "totality of the circumstances". United States ex rel. Rogers v. Adams, 435 F. 2d 1372 (2d Cir. 1970), cert. den. 404 U.S. 834, r.d. 404 U.S. 996 (1971). United States ex rel. Brown v. LaVallee, 424 F. 2d 457 (2d Cir. 1970); United States ex rel. Ward v. Deegan, 310 F. Supp. 1076 (S.D.N.Y. 1970); United States ex rel. Brock v. LaVallee, 306 F. Supp. 159, 163 (S.D.N.Y. 1969). The District Court acknowledged that this was the applicable principle (4). However, in granting the writ solely on the ground that petitioner had allegedly not been advised that intent was an element of murder in the second degree, the District Court in fact applied a much narrower standard and completely ignored the totality of all the surrounding circumstances.

Applying the totality of the circumstances test to the case at bar, it is abundantly clear that petitioner's plea of guilty was voluntary. This is not a case of a defendant being railroaded through any assembly-line system of justice as a

faceless number, confused, uncomprehending, manipulated, and unaided. On the contrary, the state court records and the evidence adduced at the hearing reveal a painstaking solicitude for petitioner by court and counsel.

Petitioner was represented throughout the entirety of the proceedings by two experienced criminal defense attorneys who devoted much time and effort in his behalf. Under the law of this Circuit, this is a factor militating in favor of the voluntariness of a plea. United States ex rel. Bullock v. Warden, Westfield State Farm for Women, 408 F. 2d 1326 (2d Cir. 1969); United States ex rel. Brown v. LaVallee, 424 F. 2d 457 (2d Cir. 1970); United States ex rel. DeFlumer v. Mancusi, 443 F. 2d 940 (2d Cir. 1971); United States ex rel. LoPiccolo v. LaVallee, 377 F. 2d 221 (2d Cir. 1967); United States ex rel. Brock v. LaVallee, supra; United States ex rel. Irving v. Henderson, 371 F. Supp. 1266 (S.D.N.Y. 1974); United States ex rel. Nixon v. Follette, 299 F. Supp. 253, 255 (S.D.N.Y. 1969); United States ex rel. Ross v. McMann, 409 F. 2d 1016, 1021 (2d Cir. 1969), vacated other grounds 346 U.S. 118.

Petitioner was given extensive psychiatric examinations to determine his fitness to proceed or stand trial, and he was found competent to stand trial and make his defense. The record is clear that petitioner understood he was accused of wilfully killing Ada Francisco and that he knew in pleading

guilty he was waiving his right to a jury trial. That petitioner understood the things he said he understood is clear, since when petitioner did not understand something he said so (97, 98). There has never been a claim that petitioner did not have the capacity to consult with his attorney. United States ex rel. Brock v. LaVallee, supra. There is no doubt that the plea taken with the advice of petitioner's experienced counsel was a reasoned and intelligent choice among available alternatives. See Point III, infra.

Petitioner delayed five years before challenging his plea. Under the law of this Circuit, such a delay also militates in favor of a finding of voluntariness of a plea. United States ex rel. Hardin v. Follette, 333 F. Supp. 371 (S.D.N.Y. 1970), affd. 450 F. 2d 879 (2d Cir. 1971); United States ex rel. DeFlumer v. Mancusi, supra; United States ex rel. Sniffin v. Follette, 439 F. 2d 1082 (2d Cir. 1971); United States ex rel. Brock v. LaVallee, supra. See also Kercheval v. United States, 274 U.S. 220, 224 (1927). This is especially so where, as here, the delay cannot be excused. While petitioner claims that he did not know that intent was an element of the crime to which he pleaded until five years after his plea, the fact remains that he must have known at the very moment of sentence that the sentence was heavier than he expected, if his testimony in federal court on this claim is accepted as true. Yet, the record indicates no surprise or

disappointment at the sentence by petitioner or his counsel, United States ex rel. Sniffin v. Follette, supra; no motion to withdraw the plea was ever made; and no direct appeal from judgment of conviction was ever taken.

In a case remarkably similar to the case at bar, petitioner sought relief after 20 years on the ground that he was never informed the range of punishment that was a consequence of his plea, United States ex rel. Brock v. LaVallee, supra. Petitioner also claimed he was mentally retarded, although he had been found mentally competent to stand trial after psychiatric examination. The District Court, Weinfeld, J., applied the totality of circumstance test, and found that in view of the fact that petitioner had been represented by an attorney from indictment through sentence, the absence of any claim of incapacity to consult with his attorneys, the assumption that petitioner was properly advised by his lawyer, and the tardiness of his claim, an evidentiary hearing was not warranted. Unlike Brock, this case has gone to a hearing, but the controlling standard - the totality of the circumstances preceding the plea - is the same, and all the factors pointing to a finding of voluntariness in Brock are also present here.

Certainly, there can be no doubt that there was a factual basis for the plea, and even the District Court believed there was a factual basis for the plea (H76). The facts of the case, as seen by petitioner's counsel, were spelled out in detail at the sentencing stage. See pp. 4-5, supra. In the pre-McCarthy (and hence pre-Boykin) cases, it was proper to ascertain the factual basis at the sentencing stage rather than the plea stage. X v. United States, 454 F. 2d 255 (2d Cir. 1971), cert. den. sub nom Jones v. United States, 406 U.S. 961 (1972); Manley v. United States, 432 F. 2d 1241 (2d Cir. 1970).

Even under petitioner's counsel's view, pp. 4-5, supra, a factual basis was presented for a plea to second degree murder. Under New York law the design to kill which is necessary to a conviction for a second degree murder can be demonstrated by multiple knife wounds in the decedent. People v. Davis, 18 A D 2d 644 (1st Dept. 1962), affd. 13 N Y 2d 1151 (1964). Although counsel suggested that petitioner meant no harm when he took his knife to the victim's room, this does not negate the possibility that he had a design to effect death at the time he actually stabbed decedent, even if it was not premeditated.

Notwithstanding all this, the District Court granted federal habeas relief solely because in its opinion no one had formally recited to petitioner the formal legal elements of the crime to which he pleaded guilty. Nothing in the law, however, suggests that a pre-Boykin plea should be set aside because of a

single alleged defect where, under the totality of the circumstances, the rights and interests of the accused have otherwise been so fully protected. The District Court, in thus failing to consider the totality of the circumstances, committed clear error.

What is at stake here is "not the integrity of the state convictions obtained on guilty pleas but whether, years later, defendants must be permitted to withdraw their pleas, which were perfectly valid when made, and be given another choice between admitting their guilt and putting the State to its proof." McMann v. Richardson, 397 U.S. 759, 773 (1970). Judge Weinfeld's eloquent statement in United States v. Malinsky, 310 F. Supp. 523, 525 (1970), is directly applicable to the case at bar:

> "The record abundantly establishes that there was a factual basis of for petitioner's guilty plea; that he voluntarily acknowledged his guilt with intelligent understanding of the nature of the charge and the consequences of the plea; and that the plea was entered when he was represented by exceptionally experienced and competent counsel. The entry of the plea was a deliberate, reasoned decision by petitioner.* To void the guilty plea upon this record would not serve the cause of justice but would make a mockery of the courts."

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* See POINT III, supra.

POINT II

PETITIONER'S GUILTY PLEA WAS NOT RENDERED INVOLUNTARY BY ANY ALLEGED FAILURE TO INFORM HIM OF THE FORMAL LEGAL ELEMENTS OF THE CRIME TO WHICH HE PLEADED. IN ANY EVENT PETITIONER HAD A FAIR UNDERSTANDING OF THE LAW IN RELATION TO THE FACTS.

The District Court found petitioner's guilty plea was involuntary solely because in its view no one told petitioner the formal legal elements of the crime to which he pleaded. Aside from the fact that this holding was completely improper as not based on the "totality of the circumstances" test, POINT I, supra, the District Court's conclusion was otherwise completely erroneous as a matter of law.

There is simply no authority holding that a 1965 guilty plea is automatically invalid on a showing of an absence of a prior recitation to the accused of the formal legal elements of the crime, and the District Court cited none. Its decision is totally without basis in law.

In issuing the writ, the District Court relied on the Supreme Court's statement in McCarthy v. United States, 394 U.S. 459 (1969), relating to federal defendants, that "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant

possesses an understanding of the law in relation to the facts". 394 U.S. at 466. In this connection, the Supreme Court in McCarthy in discussing the effect to be given to Rule 11 of the Federal Rules of Criminal Procedure, mandated the federal district courts to ascertain that there is a factual basis to guilty pleas and to make direct inquiries of a defendant pleading guilty as to whether the defendant understands the nature of the charge and the consequences of his plea.

It is not at all clear that McCarthy stands for the proposition that the District Court says it stands for. McCarthy does not mandate a recitation of the formal legal elements to a defendant before entry of a guilty plea, and the Supreme Court did not state specifically what it meant by "understanding of the law in relation to the facts".* Cf. Bruce v. United States,

* In a footnote to the excerpt from McCarthy relied on by the District Court, the Supreme Court refers to the American Bar Association's "Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty", § 1.4(a). The approved draft, however, says nothing about reciting the formal legal elements of the charge, but merely requires the court to make certain that an accused "understands the nature of the charge". § 1.4(a). This is the same phraseology found in Rule 11 of the Federal Rules of Criminal Procedure, the subject of the Supreme Court's discussion in McCarthy. The commentary acknowledges that a plea is an admission of all the elements of the charge, and thus requires a "sophisticated knowledge of the law in relation to the facts," but adds that "no specific procedure is required." In another footnote in McCarthy, the Supreme Court stated that a defendant's understanding of the essential elements of the charge to which he pleads would "seem" a necessary prerequisite to a determination that he understands the nature of the charge. However, the footnote concludes that "matters of reality, and not mere ritual, should be controlling". McCarthy, supra, at 467, fn. 20.

379 F. 2d 113 C.D.C. Cir. 1967) (possible failure of counsel to advise petitioner of elements of crime to which he pleaded did not deprive petitioner of effective assistance of counsel).

The applicability of McCarthy to the instant case is in any event, dubious. McCarthy has been held to be of prospective application only. Halliday v. United States, 394 U.S. 831 (1969). Since this case is pre-McCarthy and pre-Boykin, McCarthy is inapplicable.

It is significant that the requirement in Rule 11, Federal Rules of Criminal Procedure, that the court ascertain the factual basis of a guilty plea, was not added until 1966. The commentary states that this new provision "requires a comparison of the elements of the crime to which the plea is offered, with the facts of the offense committed by the defendant". Moore's Federal Practice, V.8, 11-63. This was not the law in 1965, when petitioner took his plea.

Assuming arguendo the District Court was correct in its belief that under McCarthy, failure to recite the formal legal elements of the crime automatically invalidates a pre-Boykin plea by a state prisoner, the District Court was clearly erroneous in finding that in this case petitioner was not advised of the

"law in relation to the facts". Petitioner denied he was ever so advised, and Mr. Rinehart admitted that he did not specifically advise petitioner of the elements of murder in the second degree. However, petitioner's other counsel, Mr. Best, said he thought he advised petitioner of the elements, see p. 11, supra, and he stated quite affirmatively that discussions of the case with petitioner were oriented around the crucial differences between degrees of homicide (H69, 70).

The District Court discounted Mr. Best's testimony because Mr. Best only "thought" he had discussed the elements with petitioner (4). However, in view of counsel's lengthly and repeated discussions of the facts of the case and alternatives with petitioner, oriented around the differences in degrees of homicide, and in view of counsel's experience, a finding was clearly warranted that the elements of the crime and the difference in degrees of homicide were, in fact, discussed so that petitioner gained a satisfactory understanding of the "law in relation to the facts". In such a case, where memories are blurred, the benefit of doubt may be accorded to such a witness. United States ex rel. Sniffen v. Follette, supra; United States ex rel. Brooks v. McCann, 408 F. 2d 823, 826 (2d Cir. 1969). Although such testimony conflicts with petitioner's version, it is significant that on the issue of whether peti-

tioner knew the consequences of the plea, the District Court resolved the conflict of testimony in favor of petitioner's assigned counsel and against petitioner.

The District Court's holding is an invitation to any pre-Boykin defendant to resurrect and challenge his musty guilty plea by coming up with an excellent memory of the circumstances preceding his plea and making the appropriate claims. Such a defendant, of course, may rest in the comfortable assurance that the memories of other key witnesses will by now have faded. Justice is not served by such a course, especially here, where petitioner's delay in raising at least one of his claims cannot be excused. See pp. 14-15, supra. Under all these circumstances, the District Court was clearly erroneous in finding that petitioner was never advised of the "law in realtion to the facts".

Finally, assuming arguendo the District Court correctly applied and interpreted McCarthy as requiring knowledge by petitioner of the elements of the crime to which he pleaded and correctly found that petitioner did not have such knowledge, the District Court was still bound to consider this defect as simply one small part of the totality of the circumstances preceding the plea. This the court utterly failed to do, and such failure was reversible error. See POINT I, supra.

POINT III

PETITIONER'S PLEA OF GUILTY WAS A REASONED, INTELLIGENT, VOLUNTARY PLEA AMONG AVAILABLE ALTERNATIVES.

The record shows clearly that petitioner pleaded guilty to second degree murder to avoid the risk of a conviction and mandatory life term for murder in the first degree. Such a choice was a voluntary and reasoned choice among alternatives. North Carolina v. Alford, 400 U.S. 25, 31, 37 (1970). Petitioner's attorneys gamely bargained for a manslaughter plea, but, failing in this, focused their study on the advisability of a plea to murder in the second degree. Petitioner's attorneys clearly gave much soul-searching thought to such a plea, but the decision to accept the plea was, in view of all the circumstances, a wise one. The compelling circumstances included the fact that petitioner had gone to the victim's room with a knife on the night of the crime. This fact, by itself, made a conviction for murder in the first degree a definite possibility, since it evidenced "deliberate and premeditated design to effect death" (former Penal Law § 1044). Moreover, petitioner had reason to effect such a crime (S117-118). Although motive is not an essential element of the crime, it may be considered on the issue of a defendant's connection with the crime and

deliberation and premeditation. E.g. People v. Sangamino, 258 N.Y. 85 (1932); People v. Sanducci, 195 N.Y. 361 (1909). On the other hand, a manslaughter charge based on an act committed in the heat of passion (former Penal Law § 1046) was negated by petitioner's carrying a knife to the room.

Petitioner's attorneys were also concerned about the fact that the deceased had suffered some forty knife wounds. They had to weigh the fact that feeling in the community was running high over the slaying and that a change in venue had been denied. They had to consider that petitioner himself did not deny that he stabbed the deceased and had given a confession.

Of course, no counsel can give advice with absolute confidence that it will achieve the best results. As the Supreme Court has said "(i)n the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. Counsel must predict how the facts, as he understands them, would be viewed by a court . . . Questions like these cannot be answered with certitude." McMann v. Richardson, 397 U.S. 759, 769-770 (1970). Thus, an accused is bound by his plea unless he can show a serious dereliction on the part of counsel. McMann v. Richardson, supra, at 774. No such dereliction has been shown here, and there is no

suggestion that counsel was incompetent. On the contrary, in view of the fact that petitioner was represented by two able and experienced counsel who did a thorough investigation and analysis of the case, the instant case is a particularly poor one for second-guessing.

Under all the above circumstances, petitioner's decision to plead guilty to second degree murder was clearly advantageous given the strong possibility of a conviction of murder in the first degree following a trial. As such it was a "voluntary and intelligent choice among alternative courses of action", North Carolina v. Alford, supra, and must stand.

There can be no doubt of course, that petitioner could have pleaded guilty to murder in the second degree even if he had simultaneously known the elements of the crime and denied intent. Indeed, even if petitioner had claimed innocence altogether, his plea would, nonetheless, stand if a "voluntary and intelligent choice among the alternative courses of action." North Carolina v. Alford, supra. Petitioner's claim that he would not have pleaded guilty if he had known that intent was an element of the crime of murder in the second degree (H8) must be viewed in the light of the rest of his testimony that he pleaded to second degree murder because he expected a lesser

sentence. The prospect of a lesser sentence is clearly what motivated petitioner to plead guilty, and petitioner himself emphasized this at the hearing. The delay in challenging the sentence as not what was bargained for is without excuse (see pp. 14-15, supra) and the District Court found against petitioner on this claim after hearing, a finding for which there was substantial evidence. Under these circumstances, petitioner's claim of involuntariness on the legal elements' issue at best turns on his own state of mind at the time, but it is well-settled that such a subjective test of voluntariness is rejected in this Circuit. United States ex rel. LaFay v. Fritz, 455 F. 2d 297 (2d Cir., 1972), cert. den. 407 U.S. 923.

CONCLUSION

THE DECISION OF THE DISTRICT COURT SHOULD BE REVERSED.

Dated: New York, New York
March 14, 1975

Respectfully submitted,

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

ANGELA FIORE , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellant herein. On the 14th day of March , 1975 , she served the annexed Appendix upon the following named person :

Mr. Joseph Lynch
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207 Metcalf Plaza
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Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorneys at the address within the State designated by them for that purpose.

Angela Fiore

Sworn to before me this
14 day of March , 1975

Ralph J. McCann

Assistant Attorney General
of the State of New York